Supreme Court, U.S.
FILED
AUG 30 2006
OFFICE OF THE CLERK

No. 05-1512

In the Supreme Court of the United States

SAMUEL ANTONIO CONSTANZA ALVARADO,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

REPLY BRIEF FOR PETITIONER

MARK H. BODNER
3925 University Drive
Fairfax, Virginia 22030
(703) 385-6667

LAWRENCE S. ROBBINS*
DANIEL R. WALFISH
Robbins, Russell, Englert, Orseck & Untereiner LLP
1801 K Street, N.W.
Suite 411
Washington, D.C. 20006
(202) 775-4500

* *Counsel of Record*

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

I. The Federal Charges Were The Same Offenses As The State Charges 2

II. Dismissal Of The State Charges Is Immaterial 6

III. Petitioner Did Not Waive His Right To Counsel 9

CONCLUSION 10

TABLE OF AUTHORITIES

Page(s)

Cases:

Austin v. *Commonwealth*, 531 S.E.2d 637 (Va. Ct. App. 2000) 5

Blockburger v. *United States*, 284 U.S. 299 (1932) 2, 3

Brown v. *Ohio*, 432 U.S. 161 (1977) 3, 4

Johnson v. *Zerbst*, 304 U.S. 458 (1938) 9

Logan v. *Commonwealth*, 600 S.E.2d 133 (Va. Ct. App. 2004) 5

Michigan v. *Harvey*, 494 U.S. 344 (1990) 10

Michigan v. *Jackson*, 475 U.S. 625 (1986) 9, 10

Oregon v. *Bradshaw*, 462 U.S. 1039 (1983) 10

Patterson v. *Illinois*, 487 U.S. 285 (1988) 9, 10

State v. *Frye*, 897 S.W.2d 324 (Tex. Crim. App. 1995) ... 6

State v. *Perry*, 515 S.E.2d 582 (W. Va. 1999) 6

Texas v. *Cobb*, 532 U.S. 162 (2001) 1, 3, 7

United States v. *Bartelho*, 129 F.3d 663 (1st Cir. 1997) ... 8

United States v. *Bowlson*, 240 F. Supp. 2d 678 (E.D. Mich. 2003) 1, 9

United States v. *Grapp*, 653 F.2d 189 (5th Cir. 1981) 5

United States v. *Knight*, 2006 WL 1722199 (E.D. Mich. June 22, 2006) 1

United States v. *Krueger*, 415 F.3d 766 (7th Cir. 2005) ... 9

United States v. *Lara*, 541 U.S. 193 (2004) 2

TABLE OF AUTHORITIES—Continued

Page(s)

United States v. *MacDougall*, 790 F. 2d 1135 (4th Cir. 1986) 4

United States v. *Mapp*, 170 F.3d 328 (2d Cir. 1999) 7, 8

United States v. *Marshank*, 777 F. Supp. 1507 (N.D. Cal. 1991) 6

United States v. *Martinez*, 972 F.2d 1100 (9th Cir. 1992) 8, 9

United States v. *Montgomery*, 262 F.3d 233 (4th Cir. 2001) 6, 7

United States v. *Nersesian*, 824 F.2d 1294 (2d Cir. 1987) . 5

United States v. *Ragins*, 840 F.2d 1184 (4th Cir. 1988) ... 4

United States v. *Red Bird*, 287 F.3d 709 (8th Cir. 2002) ... 1

United States v. *Rodríguez*, 215 F.3d 110 (1st Cir. 2000) .. 3

United States v. *Smith*, 441 F.3d 254 (4th Cir. 2006) 3

United States v. *Wheeler*, 435 U.S. 313 (1978) 2

REPLY BRIEF FOR PETITIONER

The government acknowledges the clear circuit conflict on the question presented and does not dispute that the issue is important, recurring, and deserving of this Court's attention. The government believes, however, that "it is not clear that refusal to apply the dual sovereignty doctrine would change the outcome of this case," Opp. 12, and therefore asks this Court to deny certiorari.

The government is mistaken. The Fourth Circuit declined to rely on any of the alternative grounds now advanced in the government's opposition, and for good reason: Each is either incorrect as a matter of law or fact, or highly controversial in its own right. The court below rested squarely, and solely, on the dual sovereignty doctrine, deepening an existing circuit conflict.[1] Further review is clearly warranted.

---

[1] The government suggests (Opp. 11 n.2) that we are mistaken in counting the Eighth Circuit's decision in *United States* v. *Red Bird*, 287 F.3d 709 (2002), among those that have declined to apply the dual sovereignty doctrine. But that is exactly what the Eighth Circuit did: If the Eighth Circuit had adopted the approach of the First, Fifth, and now Fourth Circuits—which have concluded that *Texas* v. *Cobb*, 532 U.S. 162 (2001), *requires* the importation of dual sovereignty principles to the Sixth Amendment context—*Red Bird* simply could not have come out as it did. Nor is it true, as the government suggests, that *Red Bird* is an outlying case because of the Eighth Circuit's concern that "the tribe and the U.S. worked in tandem to investigate" the offense, 287 F.3d at 715. Tandem investigations are one of the most common contexts in which the question presented arises, see, *e.g.*, *United States* v. *Knight*, 2006 WL 1722199 (E.D. Mich. June 22, 2006); *United States* v. *Bowlson*, 240 F. Supp. 2d 678 (E.D. Mich. 2003); see also Pet. 19, making the present case an especially *good* vehicle for resolving the question presented. See pages 8-9, *infra*. Finally, the Eighth Circuit's passing reference to tribal sovereignty as "unique and limited" (287 F.3d at 715) did not control the outcome in that case. In any event, as our petition pointed out (at 14 n.5), it is well settled that Indian tribes are generally separate sovereigns for

I. The Federal Charges Were The Same Offenses As The State Charges

The government's principal "inappropriate vehicle" claim is that there is an alternative holding—*i.e.*, that the state and federal charges were separate offenses even without regard to the dual sovereignty doctrine. Opp. 12-13. That is simply not a fair reading of the Fourth Circuit's decision. True, the opinion contains dicta observing that the state and federal *conspiracy* (but *not* substantive) charges bear certain factual differences. But the court of appeals simply did not—and, as a matter of law, could not—rest on these differences. Indeed, the Solicitor General does not actually contend that the state and federal charges really *are* different offenses under *Blockburger* v. *United States*, 284 U.S. 299 (1932). And that is hardly surprising.

A. The two *conspiracy* charges plainly *were* the same offense under *Blockburger*. The federal indictment charged that "[b]eginning in or about August 2003, and continuing through in or about October 2003," the defendant conspired "to * * * distribute" 500 grams of cocaine. The state charged that "on or about October 2, 2003" (the date the warrant was drawn up), the defendant conspired "to manufacture, sell, give, or distribute" cocaine. Court of Appeals Joint Appendix ("JA") 13-14, 23. Even conceding for the sake of argument that drug quantity was, as the court of appeals thought, "a substantive element of the federal crime" (rather than a sentencing factor), Pet. App. 11a, it would serve only to make the state conspiracy charge a concentric circle within the federal conspiracy charge. It is well settled (and the Solicitor General does not disagree) that in such circumstances—that is, when the two offenses do not *each* require proof of an *additional* fact—the two offenses are not

---

purposes of Double Jeopardy. *United States* v. *Wheeler*, 435 U.S. 313, 322-323 (1978); see also *United States* v. *Lara*, 541 U.S. 193 (2004).

separate for purposes of double jeopardy. *Brown* v. *Ohio*, 432 U.S. 161, 168-169 (1977).

As for the differences relating to timing and scope mentioned by the court of appeals, they are non-existent or irrelevant. The conspiracies had the same object: to distribute cocaine. That the federal indictment alleged a longer timeframe is irrelevant. Proof sufficient to convict on a charge alleging an agreement on or about October 2, 2003 to distribute cocaine would surely suffice to convict on the federal conspiracy charge here. See, *e.g.*, *United States* v. *Smith*, 441 F.3d 254, 261 (4th Cir. 2006) ("'Where a particular date is not a substantive element of the crime charged, strict chronological specificity or accuracy is not required.'"); *United States* v. *Rodríguez*, 215 F.3d 110, 117 (1st Cir. 2000) ("The words 'in or about' permit some latitude in proving the time of the offense alleged[.]"). Thus the state offense was nothing more than a subset of the federal offense. Also irrelevant is that the federal conspiracy alleged a series of specific overt acts, including multiple trips to North Carolina over a two-month period. None of those acts is a required element.[2]

Because the two conspiracy charges are so plainly *not* different offenses under *Blockburger*,[3] the court of appeals'

---

[2] The court of appeals also mentioned trial testimony regarding the scope of the conspiracy, but trial testimony is irrelevant under *Texas* v. *Cobb*, 532 U.S. 162, 173 (2001). The right to counsel attaches, for each offense, at the time of charging; its scope for purposes of pretrial interrogation cannot possibly be a function of specific evidence later introduced at trial. Likewise, contrary to the court of appeals' suggestion, the federal complaint is also irrelevant, given the court's own holding that the complaint did not trigger the right to counsel.

[3] In ignoring *Blockburger*, the court of appeals invoked entirely inapposite case law. The panel acknowledged that "[t]he Double Jeopardy Clause prevents the government from splitting a single conspiracy into multiple offenses," but then went on to say that "a totality of the circumstances test" is used "to decide whether two

dicta in section II.B. of its opinion are best understood as a discourse on the wisdom of the dual sovereignty doctrine on which the decision below actually rests. As for the government's suggestion (at 13) that this Court should not review the "fact-bound conclusion" that the two conspiracy charges are distinct, that is doubly flawed: The proposition that a lesser offense is the same as a greater offense for purposes of Double Jeopardy is one of law, not fact. See *Brown*, 432 U.S. at 168. More to the point, we are not asking this Court to "review" this issue at all. We are rather asking this Court not to withhold the certiorari power on the basis of a dictum that was not an alternative holding and that the government does not actually defend.

B. The government's intimation (and that is all that it is) that the state and federal *substantive* charges were separate offenses, Opp. 12, is completely misdirected. The United States

---

conspiracies are distinct." Pet. App. 10a. The panel saw "no reason why this test should not also apply to the Sixth Amendment right to counsel." *Ibid.*

There is a very good reason, however, why that test is inapplicable here. The cases cited in the opinion below take it for granted that if the same evidence could support convictions on two different conspiracies, then they are the same offense. This *Blockburger*-inspired "same evidence" inquiry, however, creates the potential for abuse in the conspiracy context because "prosecutors could carefully draw two indictments by choosing different sets of overt acts and make one conspiracy appear to be two." *United States* v. *MacDougall*, 790 F.2d 1135, 1144 (4th Cir. 1986). It was to *prevent* such abuse that the Fourth Circuit developed the "totality of the circumstances" test, under which two conspiracies could still be the same offense even if it appears from the indictments that the same evidence would *not* suffice to convict on each. But here the same evidence *would* support conviction on the two conspiracy charges. There was thus no need to reach the "totality of the circumstances" test in the first place. See *United States* v. *Ragins*, 840 F.2d 1184, 1188-1191 (4th Cir.1988); *MacDougall*, 790 F.2d at 1143-1144.

never argued the point below, and it therefore cannot do so now. Indeed, the court of appeals did not even advert to the substantive offenses in the course of its dicta—a further indication (if one were needed) that there is no alternative basis for the decision below.

In fact, the government's and court's silence on this issue may reflect their awareness that the Virginia possession charge likely *is* subsumed by the federal distribution charge. The Virginia courts regard possession as a lesser-included offense of distribution. *E.g.*, *Logan* v. *Commonwealth*, 600 S.E.2d 133, 134 (Va. Ct. App. 2004); *Austin* v. *Commonwealth*, 531 S.E.2d 637, 639 (Va. Ct. App. 2000) ("Proof of the elements of the offense of * * * distributing a controlled substance necessarily encompasses proof of the possession of that same controlled substance.").

Moreover, insofar as the government now implies that the state and federal substantive offenses were separate because they allegedly occurred on different dates, the government is relying on a mischaracterization of the charging instruments. The government states (at 3-4, 12) that petitioner was charged with committing the alleged substantive offenses "on" September 27 and October 2. That is just wrong. The United States and the Commonwealth charged, respectively, distribution "[o]n *or about* September 27, 2003" and possession with intent to distribute "on *or about* October 2, 2003." JA 17, 24 (emphases added). Not only is it settled law that a charge that an offense occurred "on or about" a particular date is satisfied by proof that it occurred reasonably *near* that date, see, *e.g.*, *United States* v. *Nersesian*, 824 F.2d 1294, 1323 (2d Cir. 1987); *United States* v. *Grapp*, 653 F.2d 189, 195 (5th Cir. 1981), but the United States took advantage of precisely that principle in its closing argument to the jury in this very case.[4]

---

[4] See 5/4/04 Tr. 40 ("The Judge has instructed you that you need not decide that the offense was committed precisely on the date

II. Dismissal Of The State Charges Is Immaterial

The government's next "inappropriate vehicle" objection is that there was no Sixth Amendment right to counsel at the time of the disputed interrogation because the state case had been dismissed. Opp. 13-15. Judge Wilkinson did not even mention this argument—though it was the very centerpiece of the government's position below—or cite *United States* v. *Montgomery*, 262 F.3d 233 (4th Cir. 2001), on which the United States continues to rely. In fact, footnote 3 of the Solicitor General's brief all but acknowledges the irrelevance of this objection.

The government's argument depends on a view of the right to counsel as something like a light bulb that shuts off the moment the "switch" that originally triggered it—the indictment—is dismissed. But it is easy to see why that view is mistaken. Imagine that only one government—say, a state government—brings charges, dismisses its charges, interrogates the defendant outside the presence of counsel, and then reindicts the defendant, and that all of this is done with the purpose of eliciting uncounseled statements. There would obviously be a Sixth Amendment violation in these circumstances. See, *e.g.*, *State* v. *Frye*, 897 S.W.2d 324, 329-330 (Tex. Crim. App. 1995) (violation on essentially these facts); *United States* v. *Marshank*, 777 F. Supp. 1507, 1525-1527 (N.D. Cal. 1991); cf. *State* v. *Perry*, 515 S.E.2d 582, 592 (W. Va. 1999) (no violation because two years had elapsed between dismissal of first prosecution and elicitation of incriminating statement, and there was no deliberate circumvention).

And if that is true in the state-state and federal-federal cases, it must be equally true in the state-federal case, assuming substantial coordination between the two governments. The only analytical way to distinguish the coordinated state-federal case

---

charged. The date need only be reasonably close to the date set forth in the indictment.").

from the state-state case is to apply the doctrine of dual sovereignty—and that of course is the precise issue on which we are seeking review. Thus the dismissal of the state charge is a true non-issue; its materiality to the petitioner's case stands or falls with the viability of the dual sovereignty doctrine.

The government relies on *Montgomery*, but the holding in that case—that a once-indicted defendant does not gain "a permanent constitutional shield," 262 F.3d at 246—is simply beside the point. In *Montgomery*, the incriminating statements were made almost a year after the state charges were dismissed. In this case, the interrogation took place moments after the state charges were dismissed—and just before defendant appeared in federal court, where he was soon appointed an attorney. Pet. 5.

Moreover, *Montgomery* acknowledged what not even the government's briefs below and here could ignore: courts have recognized that "the Sixth Amendment would be violated if state and federal authorities colluded to manipulate the timing of the dismissal and the filing of charges in a manner calculated to deprive an individual of his right to counsel." 262 F.3d at 247 (quoting *United States* v. *Mapp*, 170 F.3d 328, 334 (2d Cir. 1999)); accord Opp. 14 n.3 (citing authorities).[5] That of course was not *Montgomery*, and it was not *Mapp*, but it *is* this case.

The government says (at 14 n.3) that "petitioner has not argued below or in this Court that there was improper collusion or bad faith," but that is untrue. We argued below[6] (and strongly

---

[5] The government says (at 14 n.3) that "[i]t is unclear whether the reasoning of those cases survives *Cobb*[]," but that is a non-sequitur. Nothing in *Cobb*'s clarification of offense-specificity has any bearing on the conditions under which dismissal of a charge terminates the right to counsel—or on the implications of deliberate circumvention of Sixth Amendment rights.

[6] *E.g.*, Brief of Appellant at 17 ("Clop's interrogation of Constanza on December 5, 2003 was a knowing and intentional circumvention of his Sixth Amendment right to counsel.").

suggested in the petition (at 19)) that the authorities deliberately circumvented petitioner's rights, which is precisely what the Solicitor General identifies (at 14 n.3) as the gravamen of a claim of improper collusion. In *Mapp*, the Second Circuit approved the district court's determination "that there was no improper collusion" because "the federal and state investigations were conducted independently," "there was no federal involvement in the decision to dismiss the state charges," and "there was no state involvement in the federal authorities' decision to interrogate or charge [the defendant]." 170 F.3d at 334. The other cases cited by the Solicitor General are to the same effect. See *United States* v. *Martinez*, 972 F.2d 1100, 1105 (9th Cir. 1992) ("If * * * the federal and state authorities worked together in shuffling [the] charge from the state to the federal system, then * * * Martinez's statements should be suppressed. * * * If the dismissal of state charges or the initiation of federal interrogation was a mutual endeavor in anticipation of a federal prosecution, then * * * Martinez's Sixth Amendment right * * * was circumvented."); *United States* v. *Bartelho*, 129 F.3d 663, 675 (1st Cir. 1997) (no violation because "the government did not manipulate the robbery charges to avoid the requirements of the Sixth Amendment.").

In this case, it is undisputed that the dismissal of the state charges and the uncounseled interrogation that followed immediately thereafter were the product of close coordination between state and federal officials. These circumstances are precisely what *Mapp*, *Martinez*, *Bartelho*, and the Solicitor General classify as improper collusion. The burden that the United States alleges (at 14 n.3) is on petitioner is therefore amply satisfied. Accordingly, this is precisely the type of case in which the formality of dismissal does not terminate the right to counsel.

Nor is this case the least bit unusual. Many of the cases raising the question presented by the petition are not the "pristine" kind in which a federal interrogation occurs while a state indictment is pending, but rather are the precise type of

scenario at issue here, involving dismissal of state charges, immediately followed by interrogation by federal authorities, immediately followed by federal indictment. Examples include *United States* v. *Krueger*, 415 F.3d 766 (7th Cir. 2005), *United States* v. *Bowlson*, 240 F. Supp. 2d 678 (E.D. Mich. 2003), and *United States* v. *Martinez*, *supra*. Indeed, given the practicalities and prevalence of coordinated investigations and prosecutions, this case is actually a *better* vehicle than the theoretical "pristine" case for resolving the question presented. A ruling by this Court in this case would not only give law-enforcement agencies and defendants exceptionally valuable guidance, it would also almost certainly resolve, *a fortiorari*, the "pristine" case.

III. Petitioner Did Not Waive His Right To Counsel

The government's final "vehicle" riposte is that Constanza waived his Sixth Amendment rights anyway. Opp. 15-17. Judge Wilkinson did not so much as mention the waiver argument, and sensibly so. For one thing, as the Solicitor General acknowledges (at 16 n.5), the district court did not find that petitioner had waived those rights (as opposed to his Fifth Amendment rights). On the contrary, the district court specifically found that Constanza, who has a fifth grade education from El Salvador, "may have been confused about whether or not he had a right to have an attorney during the questioning." 3/29/04 Tr. 179. A waiver, of course, must be "knowing and intelligent," *e.g.*, *Patterson* v. *Illinois*, 487 U.S. 285, 292 (1988), and it is long settled that the determination depends on "the particular facts and circumstances surrounding [each] case, including the background, experience, and conduct of the accused." *Johnson* v. *Zerbst*, 304 U.S. 458, 464 (1938). Moreover, "it is the State that has the burden of establishing a valid waiver," and "[d]oubts must be resolved in favor of protecting the constitutional claim." *Michigan* v. *Jackson*, 475 U.S. 625, 633 (1986).

The government (at 15-16) invokes the *Michigan* v. *Jackson* principle that a suspect who has asserted the right to counsel may initiate a subsequent conversation with the police. The undisputed facts show, however—and neither court below said anything to the contrary, despite ample opportunity—that the government, not Constanza, initiated the December 5 interrogation. 3/29/04 Tr. 80 (testimony of Agent Clop) ("We initiated the contact with him when we placed him under arrest.").[7] Moreover, the very cases relied on by the government take care to point out (even though the government does not) that the waiver analysis changes when a defendant is, as Constanza was in the state case, already represented by counsel. *Michigan* v. *Harvey*, 494 U.S. 344, 352 (1990) ("To be sure, once a defendant obtains or even requests counsel * * *, analysis of the waiver issue changes."); *Patterson*, 487 U.S. at 290 n.3; see also *Bradshaw*, 462 U.S. at 1051. At a bare minimum, the accused must knowingly relinquish the benefit of the very right he has invoked. See *Harvey*, 494 U.S. at 352-353. That obviously did not happen here, and the government has never contended otherwise. Waiver is another red herring.

CONCLUSION

The petition for a writ of certiorari should be granted.

---

[7] The government's citation (at 16) of what is actually a plurality opinion in *Oregon* v. *Bradshaw*, 462 U.S. 1039 (1983), does not get it very far. *Eight justices* in that case agreed on a two-part inquiry that clearly distinguishes between (a) the literal initiation of conversation with the question "what is going to happen to me now?", and (b) a knowing and intelligent waiver of the Sixth Amendment right. *Id.* at 1045-1046, 1054 n.2. *Bradshaw* thus stands for a proposition that is the precise opposite of the government's position here: literal initiation of conversation with police (even assuming that is what happened in this case) does *not* automatically entail waiver.

Respectfully submitted,

MARK H. BODNER
3925 University Drive
Fairfax, Virginia 22030
(703) 385-6667

LAWRENCE S. ROBBINS*
DANIEL R. WALFISH
Robbins, Russell, Englert,
Orseck & Untereiner LLP
1801 K Street, N.W.
Suite 411
Washington, D.C. 20006
(202) 775-4500

* *Counsel of Record*

AUGUST 2006